

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

HOLOGIC, INC. and CYTYC SURGICAL  
PRODUCTS, LLC,

Plaintiffs and  
Counterdefendants,

V.

MINERVA SURGICAL, INC.,

Defendant and  
Counterclaimant.

C.A. No. 15-1031-JFB-SRF

## JURY TRIAL DEMANDED

**REDACTED PUBLIC VERSION**

**DEFENDANT MINERVA SURGICAL, INC.’S MOTION *IN LIMINE* NO. 6:  
TO EXCLUDE EVIDENCE AND ARGUMENT CONCERNING PRICE EROSION**

*Of Counsel:*

Vera M. Elson  
Dale R. Bish  
Christopher D. Mays  
WILSON SONSINI GOODRICH & ROSATI, P.C.  
650 Page Mill Road  
Palo Alto, CA 94304  
(650) 493-9300

GREENBERG TRAURIG, LLP  
Benjamin J. Schladweiler (#4601)  
The Nemours Building  
1007 North Orange Street  
Suite 1200  
Wilmington, DE 19801  
(302) 661-7000  
[schladweilerb@gtlaw.com](mailto:schladweilerb@gtlaw.com)

*Counsel for Defendant and Counterclaimant  
Minerva Surgical, Inc.*

Edward G. Poplawski  
Olivia M. Kim  
Erik Carlson  
Neil N. Desai  
WILSON SONSINI GOODRICH & ROSATI, P.C.  
633 West Fifth Street, Suite 1550  
Los Angeles, CA 90071  
(323) 210-2900

Dated: June 25, 2018

[REDACTED] Evidence of price erosion therefore lacks required foundation. Further, it is irrelevant and, even if relevant, should be excluded as unfairly prejudicial to Minerva and unnecessarily confusing and delay inducing.

[illegible]

Ex. 77 at 150:4-151:9.

1

*Id.* at ¶97 (emphasis added).

*Id.* (emphasis added).

Despite disclaiming this theory of damages, it appears Hologic nevertheless intends to introduce evidence of price erosion at trial, including excerpts from Mr. Compton's testimony

1

D.I. 284, Ex 89 at 65:6-66:23; 78, 98:3-13.

<sup>2</sup> Examples of data that Mr. Barry said were needed, but not available, include: “pricing data from other competitors to evaluate against NovaSure pricing,” “complex reimbursement rate data across various coverage providers (i.e., various commercial insurance carriers, Medicare/Medicaid,” and the “elasticity of demand impacts on NovaSure volume.” D.I. 282, Ex. 52 at 33.

[REDACTED] Ex. B, 02/19/16

Compton Tr. 88:10-23. [REDACTED]

[REDACTED] See, e.g., PTX-365, PTX-366, PTX-367, PTX-368, PTX-369, PTX-404, PTX-402, PTX-407.

Hologic should be precluded from presenting such evidence and argument at trial. First, price erosion is irrelevant given Hologic's express abandonment of that theory (FED. R. EVID. 402) and the evidence lacks *foundational* relevance given its economic invalidity. FED. R. EVID. 104; *Rolls-Royce PLC v. United Techs. Corp.*, No. 1:10cv457 (LMB/JFA), 2011 U.S. Dist. LEXIS 48984, at \*11-13 (E.D. Va. May 4, 2011) (granting *motion in limine* precluding evidence of price erosion given lack of valid economic support) (citing *Crystal Semiconductor Corp. v. Tritech Microelectronics Int'l*, 246 F.3d 1336, 1357 (Fed. Cir. 2001)). Second, such evidence (included testimony that was later rebuked) is misleading and its use at trial will cause juror confusion, delay the proceedings, and prejudice Minerva. FED. R. EVID. 403; *Enova Tech. Corp. v. Initio Corp.*, Case No. 1:10-cv-00004-LPS, D.I. 458 (D. Del. Jan 13, 2013) (excluding price erosion evidence under Rules 402/403 where plaintiff is not seeking, and cannot demonstrate price erosion). Moreover, any anecdotal instance of pricing impacts to NovaSure depends on hearsay from customers whose testimony Hologic chose not to seek. FED. R. EVID. 801.

Finally, to the extent Hologic contends evidence of price erosion is relevant to its request for equitable relief, which is the relief that Hologic is actually seeking on its non-patent claims, the introduction of such issues to the jury will only delay the proceedings and further confuse the jury with issues that can and should be raised separately to the Court. *Sanijet Corp v. Jacuzzi, Inc.*, No. 3:01cv0897-P, 2002 WL 1398456, at \*2 (N.D. Tex. Feb 14, 2002).

Respectfully submitted,

GREENBERG TRAURIG, LLP

*Of Counsel:*

Vera M. Elson  
Dale R. Bish  
Christopher D. Mays  
WILSON SONSINI GOODRICH & ROSATI, P.C.  
650 Page Mill Road  
Palo Alto, CA 94304  
(650) 493-9300  
[velson@wsgr.com](mailto:velson@wsgr.com)  
[dbish@wsgr.com](mailto:dbish@wsgr.com)  
[cmays@wsgr.com](mailto:cmays@wsgr.com)

Edward G. Poplawski  
Olivia M. Kim  
Erik Carlson  
Neil N. Desai  
WILSON SONSINI GOODRICH & ROSATI, P.C.  
633 West Fifth Street, Suite 1550  
Los Angeles, CA 90071  
(323) 210-2900  
[epoplawski@wsgr.com](mailto:epoplawski@wsgr.com)  
[okim@wsgr.com](mailto:okim@wsgr.com)  
[ecarlson@wsgr.com](mailto:ecarlson@wsgr.com)  
[ndesai@wsgr.com](mailto:ndesai@wsgr.com)

/s/ Benjamin J. Schladweiler

Benjamin J. Schladweiler (#4601)  
The Nemours Building  
1007 North Orange Street  
Suite 1200  
Wilmington, DE 19801  
(302) 661-7000  
[schladweilerb@gtlaw.com](mailto:schladweilerb@gtlaw.com)

*Counsel for Defendant and Counterclaimant  
Minerva Surgical, Inc.*

Dated: June 25, 2018

**CERTIFICATE OF SERVICE**

I, Benjamin J. Schladweiler, hereby certify that on June 25, 2018, I caused the foregoing *Defendant Minerva Surgical, Inc.'s Motion In Limine No. 6: to Exclude Evidence and Argument Concerning Price Erosion* to be served via electronic mail upon the following counsel of record:

Karen L. Pascale  
Pilar G. Kraman  
James L. Higgins  
YOUNG CONAWAY STARGATT & TAYLOR LLP  
Rodney Square  
1000 North King Street  
Wilmington, Delaware 19801  
[kpascale@ycst.com](mailto:kpascale@ycst.com)  
[pkraman@ycst.com](mailto:pkraman@ycst.com)  
[jhiggins@ycst.com](mailto:jhiggins@ycst.com)

Amie L. Medley  
ARNOLD & PORTER KAYE SCHOLER LLP  
777 South Figueroa Street, 44th Floor  
Los Angeles, California 90017-5844  
[amie.medley@apks.com](mailto:amie.medley@apks.com)

Ryan J. Casamiquela  
ARNOLD & PORTER KAYE SCHOLER LLP  
10th Floor, Three Embarcadero Center  
San Francisco, California 94111-4024  
[ryan.casamiquela@apks.com](mailto:ryan.casamiquela@apks.com)

*Counsel for Plaintiffs and  
Counterdefendants Hologic, Inc. and  
Cytoc Surgical Products, LLC*

Matthew M. Wolf  
Edward Han  
Marc A. Cohn  
William Z. Louden  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Avenue, N.W.  
Washington, D.C. 20001-3743  
[matthew.wolf@apks.com](mailto:matthew.wolf@apks.com)  
[ed.han@apks.com](mailto:ed.han@apks.com)  
[marc.cohn@apks.com](mailto:marc.cohn@apks.com)  
[william.louden@apks.com](mailto:william.louden@apks.com)

Assad Rajani  
David A. Caine  
Philip W. Marsh  
ARNOLD & PORTER KAYE SCHOLER LLP  
3000 El Camino Real  
Five Palo Alto Square, Suite 500  
Palo Alto, California 94306-3807  
[assad.rajani@apks.com](mailto:assad.rajani@apks.com)  
[david.caine@apks.com](mailto:david.caine@apks.com)  
[philip.marsh@apks.com](mailto:philip.marsh@apks.com)

Jennifer A. Sklenar  
ARNOLD & PORTER KAYE SCHOLER LLP  
777 South Figueroa Street, 44<sup>th</sup> Floor  
Los Angeles, California 90017-5844  
[jennifer.sklenar@arnoldporter.com](mailto:jennifer.sklenar@arnoldporter.com)

*Counsel for Plaintiffs and  
Counterdefendants Hologic, Inc. and  
Cytoc Surgical Products, LLC*

/s/ Benjamin J. Schladweiler  
Benjamin J. Schladweiler (#4601)